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and ANCESTRY.COM LLC*

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ANTHONY SESSA and MARK SESSA, *on  
behalf of themselves and all others similarly  
situated,*

Plaintiffs,

v.

ANCESTRY.COM OPERATIONS INC., a  
Virginia Corporation; ANCESTRY.COM  
INC., a Delaware Corporation; and  
ANCESTRY.COM LLC, a Delaware Limited  
Liability Company,  
Defendants.

Case No.: 2:20-cv-02292-GMN-BNW

**JOINT DISCOVERY PLAN AND  
PROPOSED ORDER**

Complaint filed: Dec. 17, 2020

1 Having met and conferred, the parties to the above-entitled action jointly submit this  
2 JOINT DISCOVERY PLAN & PROPOSED ORDER pursuant to Civil Local Rule 26-1.

3 **1. Discovery Cut-Off Date.**

4 Plaintiffs' Position: consistent with the Joint Discovery Plan and Proposed Order filed on  
5 March 21, 2021 (ECF No. 29), Plaintiffs anticipate completing discovery within twelve months of  
6 the Court's ruling on Defendants' anti-SLAPP motion. The Court denied Defendants' anti-SLAPP  
7 motion on September 17, 2021 (ECF No. 36). Accordingly, Plaintiffs propose a discovery cut-off  
8 date of September 19, 2022.  
9

10 Defendants have informed Plaintiffs that Defendants intend to appeal this Court's ruling  
11 denying their anti-SLAPP motion, and that Defendants intend to seek a stay of discovery while  
12 their appeal is pending. No appeal has yet been filed, nor have Defendants yet filed a motion  
13 seeking a stay of discovery. Plaintiffs are prepared to start discovery immediately and therefore  
14 propose specific dates and discovery topics in this Discovery Plan.  
15

16 Plaintiffs believe Defendants' anti-SLAPP motion is without merit, and that any appeal  
17 Defendants take would be for the purpose of delaying this case. Should Defendants appeal this  
18 Court's anti-SLAPP ruling, Plaintiffs reserve the right to move this Court for a ruling that  
19 Defendants' anti-SLAPP motion is frivolous or vexatious, and for an award of attorneys' fees,  
20 costs, and damages of \$10,000 as provided for under N.R.S. 41.670. Plaintiffs further reserve the  
21 right to request that this Court deny a stay pending Defendants' appeal. Under N.R.S. 41.670(3)(b),  
22 this Court may grant any "relief as the court deems proper to punish and deter the filing of frivolous  
23 or vexatious [anti-SLAPP] motions."  
24

25 Should Defendants obtain a stay of discovery, Plaintiffs reserve the right to pursue this case  
26 without having obtained discovery from Defendants, including filing a motion for class  
27 certification.  
28

Defendants’ Position: Pursuant to Nevada Revised Statute § 41.670, Ancestry has appealed this Court’s order denying its anti-SLAPP motion (ECF No. 36; ECF No. 39). *See, e.g., Wynn v. Bloom*, 852 F. App’x 262 n. 1 (9th Cir. 2021) (recognizing right to appeal denial of anti-SLAPP motion under Nevada law). Nevada’s anti-SLAPP statute mandates that discovery “shall” be stayed pending “disposition of any appeal from the ruling on the motion.” Nev. Rev. Stat. Ann. § 41.660(3)(e). *See also Freedom Mortg. Corp. v. Kent as Tr. of 6221 Red Pine Tr.*, 2021 WL 601605, at \*2 (D. Nev. Feb. 16, 2021) (“[I]mportantly, NRS 41.660(3)(e)(2) expressly contemplates a stay pending the disposition of any appeal. The Motion for Reconsideration is an appeal to the District Judge. The Court will order that a stay of discovery remain in place until Judge Gordon decides the pending Motion”); *Foley v. Pont*, 2012 WL 2503074, at \*5 (D. Nev. June 27, 2012) (“[S]taying discovery pending the outcome of the . . . Defendants’ anti-SLAPP motion to dismiss is warranted under NRS 41.660(3).”). Because a discovery stay is mandated by statute, it appears premature to establish a discovery schedule.

Plaintiffs contend Ancestry’s anti-SLAPP motion is “frivolous.” The motion had ample basis even if denied,<sup>1</sup> but to the extent plaintiff seek to press that position, it must be decided by the Ninth Circuit. *See, e.g., Randazza v. Cox*, 2015 WL 4419543, at \*2 (D. Nev. July 20, 2015)

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<sup>1</sup> Plaintiffs offer nothing to support this conclusory assertion, which would require them to meet the high bar of demonstrating “any reasonable attorney would agree the motion was totally devoid of merit.” *E.g., Rudisill v. California Coastal Co.*, 247 Cal. Rptr. 840 (2019); *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 756 (2009) (recognizing “California’s anti-SLAPP statute is similar in purpose and language to Nevada’s anti-SLAPP statute”). This Court’s denial of the anti-SLAPP motion is not a basis for a determination the motion was frivolous. *See, e.g., Borenstein v. Animal Found.*, 2021 WL 1035100, at \*16 (D. Nev. Mar. 17, 2021). And, while this Court determined the alleged use of plaintiffs’ names was not “in connection with public affairs” because “the use is for commercial purposes,” there is a substantial question whether commercial use precludes application of the “public affairs” exception. *See, e.g., Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 868–69 (1979) (“The First Amendment is not limited to those who publish without charge. . . . The fact that respondents sought to profit from the production and exhibition of a film utilizing Valentino’s name and likeness is not constitutionally significant.”). Were it otherwise, if the Las Vegas Review previewed an article about President Biden’s inauguration that included his image, but required readers to go through a paywall to access it, the article would lose the protection of this exception.

1 (recognizing court “lacked jurisdiction to decide issues regarding . . . counterclaims” while an  
2 order denying the anti-SLAPP motion to strike those counterclaims was on appeal) (citing *Natural*  
3 *Resources Defense Council, Inc. v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001)).

4 In addition to the discovery stay effected by the appeal of Ancestry’s anti-SLAPP motion,  
5 Ancestry will also be filing a motion to stay the case in its entirety pending disposition of both the  
6 anti-SLAPP appeal in this case, as well as plaintiffs’ appeal from an order granting Ancestry’s  
7 motion to dismiss in *Callahan v. Ancestry.com, Inc.*, Case No. 21-16161 (9th Cir.). In *Callahan*  
8 the Ninth Circuit will address two issues that will potentially dispose of plaintiffs’ claims here: (1)  
9 whether an alleged violation of the “right of publicity,” standing alone, can give rise to an injury  
10 sufficient to confer Article III standing; and (2) whether Ancestry is immune to these claims  
11 pursuant to section 230 of the Communications Decency Act. Because the conduct underlying  
12 both this action and *Callahan* are identical, the Ninth Circuit’s decision will likely have outcome-  
13 determinative application here. Courts routinely issue stays in similar circumstances. *See, e.g.*,  
14 *Lilly v. Cheyenne Med. LLC*, 2020 WL 8269543, at \*1 (D. Nev. Nov. 30, 2020) (“I agree that a  
15 stay is justified here. The Supreme Court’s decision in *Facebook* should simplify many of the  
16 issues in this case . . . and could be case-dispositive.”); *United States v. Landeros*, 2017 WL  
17 10085686, at \*1–2 (D. Nev. Jan. 4, 2017) (“The *Beckles* decision is thus almost certain to  
18 determine whether petitioner has a cognizable claim . . . A stay pending the decision in *Beckles*  
19 will thus simplify the proceedings and promote the efficient use of the parties’ and the court’s  
20 limited resources.”); *Busk v. Integrity Staffing Sols., Inc.*, No. 2:10-CV-1854-RLH-NJK, 2013 WL  
21 4786254, at \*2 (D. Nev. Sept. 5, 2013) (“Plaintiffs are seeking to pursue a class action which will  
22 include nationwide discovery costs and legal fees and ultimately be very costly and burdensome  
23 for Defendant. However, the Supreme Court’s decision . . . could drastically alter the parties’  
24 litigation focus and, indeed, the case itself. Therefore, forcing Defendant, and Plaintiffs for that  
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1 matter, to proceed prior to a decision . . . risks wasting a substantial amount of resources on a case  
 2 that may never go forward in its current form. Requiring the parties to incur such costs would be  
 3 both pointless and prejudicial.”).

4 **2. Amending the Pleadings and Adding Parties, Expert Disclosures, Dispositive**  
 5 **Motions, and Pretrial Order.**

6 Plaintiffs’ Position: Consistent with Local Rule 26-1(b)(2), Plaintiffs propose a deadline  
 7 for filing motions to amend the pleadings or to add parties that is ninety days before the close of  
 8 discovery, *i.e.* June 21, 2022.

9 Plaintiffs do not presently anticipate a need for expert testimony. In the event expert  
 10 testimony is needed, consistent with Local Rule 26-1(b)(3), Plaintiffs propose the deadline for  
 11 expert disclosures as sixty days before the close of discovery, *i.e.* July 21, 2022. Plaintiffs propose  
 12 the deadline for rebuttal disclosures as thirty days before the close of discovery, *i.e.* August 19,  
 13 2022.  
 14

15 Consistent with Local Rules 26-1(b)(4) and (b)(5), Plaintiffs propose the deadline for  
 16 dispositive motions as thirty days after the discovery cut-off date, *i.e.* October 31, 2022, and the  
 17 deadline for filing a joint pretrial order as thirty days after the deadline for dispositive motions, *i.e.*  
 18 December 1, 2022.  
 19

20 Defendants’ Position: For reasons set forth above, Ancestry believes it is premature to set  
 21 deadlines that are effectively keyed off the close of discovery. However, should this case proceed,  
 22 Ancestry (1) anticipates filing a motion for summary judgment and a motion to deny class  
 23 certification, and (2) may engage experts, including with respect to potential class certification  
 24 issues.

25 **3. Fed. R. Civ. P. 26(a) Disclosures**

26 Plaintiffs’ Position: Plaintiffs propose exchanging initial disclosures under Rule 26(a)  
 27 within fourteen days of the filing of this Discovery Plan, *i.e.* on or before October 15, 2021.  
 28

1           Defendants' Position: Ancestry objects to the initial disclosure requirement set forth in  
2 Federal Rule of Civil Procedure 26(a). Ancestry has appealed the denial of its motion to strike  
3 which, as set forth above, stays discovery pending disposition of the appeal. *See, e.g., Freedom*  
4 *Mortg. Corp.*, 2021 WL 601605 at \*2 (“[I]mportantly, NRS 41.660(3)(e)(2) expressly  
5 contemplates a stay pending the disposition of any appeal.”); *Foley*, 2012 WL 2503074 at \*5  
6 (“staying discovery pending the outcome of the [] Defendants’ anti-SLAPP motion to dismiss is  
7 warranted under NRS 41.660(3).”).

#### 8 9           **4. Alternative Dispute Resolution**

10           Plaintiffs' Position: Plaintiffs are willing to discuss the possibility of mediation. Consistent  
11 with the Joint Discovery Plan and Proposed Order filed on March 21, 2021 (ECF No. 29), Plaintiffs  
12 would agree, subject to approval from the Court, to participate in private mediation.

13           Defendants' Position: Ancestry believes any mediation would be most productive  
14 following disposition of its appeal of this Court’s denial of its anti-SLAPP motion and the pending  
15 *Callahan* appeal. Should this case proceed, Ancestry would agree to participate in private  
16 mediation, subject to approval from the Court.

#### 17 18           **5. Alternative Forms of Case Disposition**

19           The parties certify that they considered trial by magistrate judge and use of the Short Trial  
20 Program. The parties agree that neither are appropriate for this matter.

#### 21 22           **6. Electronic Evidence**

23           Because Defendant has taken the position that discovery should be stayed pending their  
24 anti-SLAPP appeal, the parties have not discussed whether they intend to present evidence in  
25 electronic format to jurors.

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27           ///

1           **7. Topics for Discovery**

2           Plaintiffs' Position: Plaintiffs anticipate seeking discovery on the following topics.

3           Plaintiffs reserve the right to seek discovery on additional topics as the case develops.

4           (1) Documents and testimony showing the economic value of plaintiffs' names and images  
5           to Ancestry, including: licensing fees Ancestry pays to third parties for access to  
6           Plaintiffs' photographs; conversion rates for users who receive free-trial records and  
7           "hint" emails; and Ancestry's statements regarding why they use Plaintiffs' names and  
8           images.

9           (2) Documents and testimony showing how Ancestry's website functions when presenting  
10          Plaintiffs' names, photographs, and personal information in advertisements.

11          (3) Documents and testimony showing Ancestry's expectations regarding how subscribers  
12          will use Plaintiffs' photographs.

13          (4) Documents and testimony about privacy and intellectual property concerns related to  
14          Ancestry's collection and use of personal information.

15          (5) Documents and testimony showing the number of photographs in Ancestry's database  
16          corresponding to Nevada yearbooks, and the number of subscribers in Nevada.

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Defendants' Position: Ancestry believes identification of discovery topics is premature in light of its appeal of the Court's denial of its anti-SLAPP motion, as set forth above.

Respectfully submitted,

**KNEPPER & CLARK LLC**

/s/ Miles N. Clark

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**Order**

IT IS ORDERED that ECF No. 40 is DENIED. The Court does not find good cause for such an extended discovery period. The parties shall have the standard, 180-day discovery plan starting from September 17, 2021. The parties may stipulate to or move for extensions of discovery, if necessary.

IT IS SO ORDERED

DATED: 5:10 pm, October 04, 2021



BRENDA WEKSLER  
UNITED STATES MAGISTRATE JUDGE